No. 11,088

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, Executor of the Estate of Margaret Eyre Girvin, Deceased,
Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

I. THE ISSUE.

The question before this court is whether this case is governed by *May v. Heiner,* 281 U. S. 238, 50 Sup. Ct. 286, and *United States v. Brown,* 134 Fed. (2d) 372, decided by this court in 1943, or whether it comes within *Helvering v. Hallock,* 309 U. S. 106, 60 Sup. Ct. 444, *Fidelity Co. v. Rothensies,* 324 U. S. 108, 65 Sup. Ct. 508, *Commissioner v. Estate of Field,* 324 U. S. 113, 65 Sup. Ct. 511 and *Goldstone v. United States,* 325 U. S. ....., 65 Sup. Ct. 1323, as claimed by the petitioner.

II. THE ARGUMENT.

1. ANALYSIS OF THE INSTANT TRUST.

Shortly after the death of her husband, the decedent in 1924 created a trust of her half of the community property in which she transferred that property to the respondent bank, as trustee, upon the same terms as stated in her husband's will. By the terms of the husband's will the trustee bank was to convert the whole estate into money and invest and reinvest the same in certain securities and to stand possessed of such investments referred to as the trust fund and of the annual income therefrom, upon trust "to pay the said income to my wife, during her life and after her death to divide the said trust fund between my said son Richard Girvin and my said daughter Lee Girvin Tevis" in certain unequal shares, "provided that should either of them die in the lifetime of my said wife leaving issue at her death such issue shall take the share which their parent would have taken and if more than one in equal shares. Provided further that should either of my said children die in the lifetime of my said wife without issue, then I direct that on the death of my said wife, the survivor shall take the whole of the said trust fund absolutely". (R. 23, 24.)

By virtue of the terms of the father's will for a conversion of the estate into money, the trust which followed was necessarily one of personal property.

By virtue of the terms of the testamentary trust and of the trust deed of the respondent's testatrix such legal title passed to the trustee as was necessary

to enable the trustee to execute the trust. (*Title Ins. & Trust Co. v. Duffill,* 191 Cal. 629.) Obviously that legal title so passing to the trustee was the legal ownership thereof so as to enable the trustee to divide that property between the children upon the wife's death. The legal estate had vested in the trustee in 1924 and an equitable estate at the same time in the unequal shares referred to in the father's will had vested in Richard Girvin and Lee Girvin Tevis and remained so vested up to and including the death of the life tenant in the trust. (*Title Insurance & Trust Co. v. Duffill,* supra.)

In the *Duffill* case the mother of Harry Duffill had created a testamentary trust in certain of her property with certain of the income therefrom to be paid to Harry Duffill, until his son should reach the age of 21 years, at which time one half of the *corpus* of this trust property was to be transferred and conveyed to Harry Duffill.

Commenting upon Section 863 of the California Civil Code, the court, in the *Duffill* case said at page 648:

> "It has been construed by this court many times, and the conclusion has been firmly established that 'the estate which a trustee takes by virtue of section 863 is not necessarily a fee, but only such estate as is required for the execution of his trust'."

The court, again in the *Duffill* case, said at pages 648 and 649:

> "In Gray v. Union Trust Co., 171 Cal. 637, 640 (154 Pac. 306, 308), a substantive 'equitable estate' was recognized to exist in one who had a 'usufructuary interest in the whole estate during her life', notwithstanding there was 'conveyed to the trustee the whole legal title, since so much (was) plainly necessary for the purpose of the trust (Civ. Code, Sec. 863),' which general purposes were to give the trustor the beneficial use of the property during her life, and upon her death to see that the property went to her nominees under her will."

And the court, in this *Duffill* case concluded on page 649 as follows:

> "It were useless, we feel, to carry this discussion to greater length, or to discuss other phases of the matter and probable lines of solution of the problem here presented. Harry Duffill was vested with an equitable estate and beneficial interest in his mother's property immediately upon her death, with only such legal title lodged in the Los Angeles Trust and Savings Bank as is required for the execution of the testamentary trust. That this interest was assignable is beyond controversy."

This *Duffill* case has been since followed with approval in *Lynch v. Cunningham,* 131 Cal. App. 164, 168 et seq. where the court said at page 172, that the court in the *Duffill* case:

> "held that, as to the entire *corpus* of the trust, real as well as personal, Harry Duffill had a present vested equitable interest".

In this case, therefore, while the testatrix in this estate of Margaret Eyre Girvin, deceased, had, under

the terms of her husband's will and under the terms of her own deed to the Bank of California N. A. as trustee, an equitable life estate or interest in the trust fund, created by that will and her deed, and while the trustee held the legal title to that trust fund, her two children Richard Girvin and Lee Girvin Tevis had present vested equitable estates or interests in said trust fund of so real and substantial a character, as to be assignable in their mother's lifetime.

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2. MAY v. HEINER.

The circumstances of this trust, bring the case squarely within the principles of *May v. Heiner* and *U. S. v. Brown,* supra. Upon Richard Donald Girvin's death in 1924 the legal title to one-half of the community property, subject to probate administration vested in the Bank of California N. A. as trustee under his will and an equitable estate therein vested in Richard Girvin and Lee Girvin Tevis, his sister. Upon the transfer effected in 1924 by the deed of Margaret Eyre Girvin creating a trust of her half of said community property, the legal title thereto vested in the Bank of California N. A. as trustee and an equitable estate therein vested in her son Richard Girvin and her daughter Lee Girvin Tevis. There was no part of this trust fund left in her estate to pass on to any one on her death. The possibility of a reverter is after all a mere possibility and a mere possibility is not an interest in property, or any interest of any kind any more than is the expectancy of an heir.

(California Civil Code, Section 700.) A mere possibility of reverter cannot be transferred. (California Civil Code, Section 1045.)

In *May v. Heiner,* supra, the settlor, Pauline May, wife of Barney May by instrument dated October 1, 1917 transferred certain bonds, notes, corporate stocks and moneys to certain trustees in trust to collect the income therefrom and after discharging taxes, expenses, etc., to pay the balance to Barney May during his lifetime, and after his decease to pay such balance to Pauline May during her lifetime, and after her decease all the property in said trust, after paying certain expenses of the trust, was to be distributed equally among her four children, their distributees or appointees.

This transfer, the court declared,

> "was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event." (281 U. S., page 243, 50 Sup. Ct. 287.)

The decision of the court was that this trust fund formed no part of the gross estate of Mrs. May and was therefore not taxable as such under the Revenue Act of 1918, Sections 401 and 402.

At no time has the Supreme Court expressly overruled this case of *May v. Heiner.*

3. U. S. v. BROWN.

In *U. S. v. Brown,* supra, Brown in 1923 created an irrevocable trust whereby he transferred to himself and his two sons as trustees certain shares of stock then owned by him. Brown in that case like Mrs. Girvin in this case made no provision for reversion of any part of the *corpus.* During the lives of Brown and his wife and the survivor of them the income was to be paid in certain proportions to Brown, his wife and their three children. The trust was to terminate upon the death of the survivor of Brown and his wife. Thereupon the *corpus* of the trust was to vest absolutely in equal shares in their three children, or their issue and spouses in certain proportions or in the absence of issue or spouse of any child his share went to the surviving children or their issue and spouses. This trust was in force at the time of Brown's death in 1923 and terminated with the death of his wife in 1940.

The commissioner in the *Brown* case as in this case (Brief, p. 5) conceded that in view of *Hassett v. Welch,* 303 U. S. 303, 58 Sup. Ct. 559, he was not relying upon the amendments of 1931 or 1932 which operated prospectively only. But the commissioner in the *Brown* case claimed that Brown had made a transfer by trust "which was intended to take effect in possession or enjoyment at or after his death" within the meaning of Section 302(c) of the Revenue Act of 1926 as it read prior to the amendments of 1931 and 1932, which is substantially his position in this case. Section 811(c) of the Internal Revenue Code to

which the petitioner refers in his brief (p. 2) is Section 302(c) of the Revenue Act of 1926, as modified by the prospectively operating amendments of 1931 and 1932. (Joint Resolution of March 3, 1931, Ch. 454, 46 Stat. 1516 and Section 803(a) Revenue Act of 1932.)

On the authority of *May v. Heiner,* supra, which this court recognized in 1943 was then the law, this court decided that the Brown trust fund was not taxable as part of his gross estate.

"As late as 1938",

this court said in the *Brown* case, at page 373 in 134 Fed. (2d):

> "the court in Hassett v. Welch, supra, appears to have regarded May v. Heiner as subsisting authority. The court did not expressly or by necessary implication overrule it in Helvering v. Hallock, 309 U. S. 106, 60 Sup. Ct. 444. In the Hallock case the court fixed upon the provision for a reversion of the *corpus* as the 'string' warranting the inclusion under sect. 302(c) of the assets transferred in trust. There is here no string."

This court, today, we respectfully suggest stands in the same position it occupied in 1943 in deciding the *Brown* case. So far as anything has been said by our Supreme Court *May v. Heiner,* supra, is still the law. The recent cases in the Supreme Court cited by counsel for the petitioner all exhibit the presence of "strings" such as were the warrant for the decision in *Helvering v. Hallock,* supra.

4. THE RECENT CASES IN THE SUPREME COURT.

In *Fidelity Co. v. Rothensies,* 324 U. S. 108, 65 Sup. Ct. 508, the settlor in 1928 transferred certain property in trust to pay the income to the settlor during her life and at her death to his two daughters (aged 12 and 10 in 1928) during their lives. At the death of each daughter the *corpus* supporting her share of the income was to be paid to her descendants. If either daughter died without leaving surviving descendants the *corpus* of her share was to be added to the share of the other daughter. But if both daughters died without leaving surviving descendants, the *corpus* was to be paid to such persons as the settlor might appoint by will. In default of such appointment, the *corpus* was to go to certain named charities.

The reservation of this power of appointment, furnished "the string" warranting the taxability of the assets so transferred in trust, a power which the settlor exercised in a will made in 1930. The settlor died four years later.

In this case the court said:

> "The courts below, utilizing the principles set forth in *Klein v. United States,* 283 U. S. 231, 51 Sup. Ct. 398 and Helvering v. Hallock, 309 U. S. 106, 60 Sup. Ct. 444, correctly held that the decedent's transfer in trust in 1928 was one intended to take effect in possession or enjoyment at or after death within the meaning of section 302(c) of the Revenue Act of 1926, prior to the amendments of 1931 and 1932."

And later the court, in this case said:

> "Only at or after her death was it certain whether the property would be distributed under the power of appointment or as provided in the trust instrument. * * * Thus until the moment of her death or until an undetermined time thereafter the decedent held a string or contingent power of appointment over the total *corpus* of the trust. The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property subjected the value of the entire *corpus* to estate tax liability."

No such a string was reserved by Mrs. Girvin in the case now at the bar of this court.

It will be noted that in the *Fidelity Co.* case the court did not expressly overrule the case of *May v. Heiner,* supra, and Mr. Justice Douglas in his concurring opinion in the *Fidelity Co.* case declared:

> "So in this case, as in Commissioner v. Field, 324 U. S. 113, 65 Sup. Ct. 511, we are not faced with the question whether May v. Heiner, 281 U. S. 238, 50 Sup. Ct. 286, should survive Helvering v. Hallock, 309 U. S. 106, 60 Sup. Ct. 444."

In *Commissioner v. Estate of Field,* 324 U. S. 113, 65 Sup. Ct. 511, the settlor in 1922 transferred to a trustee certain assets in trust to pay the income during his life to the settlor unless the trust should terminate before his death. The term of this trust was to be measured by the lives of two nieces and the survivor of them, unless terminated earlier. If the

settlor died during the continuance of the trust leaving issue, the income during the remaining trust period was to be paid to such issue, subject to a right reserved to the settlor to make changes by will or otherwise as to the interests of such issue. If, however, the trust terminated during the life of the settlor the *corpus* of the trust was to be paid over to him. The settlor at no time had any issue and he died in 1937. The trust was in force throughout the life of the settlor, but at the settlor's death, if he died without any issue surviving, the *corpus* of the trust was then to go to a surviving sister of the settlor and to the surviving issue of a deceased brother.

The court in this case said:

> "The trust here was limited in duration to the lives of the decedent's two nieces. But if both nieces died before the decedent, the *corpus* would have been paid to the decedent * * *. Thus until decedent's death it was uncertain whether any of the *corpus* would pass to the beneficiaries or whether it would revert to the decedent."

The possible reversion here referred to was obviously that reserved by the settlor in the trust instrument itself, for the court continues:

> "Decedent retaining a string attached to all the property until death severed it, the entire *corpus* was swept into the gross estate and was taxable accordingly."

Again in concurring in this decision Mr. Justice Douglas expressly said that whether *May v. Heiner,*

supra, is still the law was not determined by this decision. Referring to *May v. Heiner,* he says:

> "If the trust gave a life estate to the decedent and the remainder to his children, section 302(c) of the 1926 Act would not require the payment of a tax under the rule of May v. Heiner * * *. The theory of May v. Heiner was that under those circumstances no interest in the property passed from the grantor to the remainderman on the grantor's death, since the title of the remainderman had been definitely fixed by the trust deed. We need not determine whether the rule of May v. Heiner, supra, should survive Helvering v. Hallock, supra. * * * For in this case the grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the *corpus* would have returned to the grantor if he survived his neices. Hence it seems plain that the gifts over would take effect in possession or enjoyment only at or after the death of the grantor."

In *Goldstone v. United States,* 325 U. S. ....., 65 Sup. Ct. 1323 the question as stated by the court was whether the proceeds of certain insurance contracts payable upon the death of the decedent to his wife were includible in his gross estate for estate tax purposes under section 302(c) as amended (Sect. 811(c) Internal Revenue Code.)

In 1933 the Equitable Life Assurance Society of the U. S. issued two contracts for which the decedent paid sums aggregating $26,500.00.

(a) One contract insured decedent's life for $18,928.00 for a single premium of $14,357.08 payable

upon death to his wife, if living, and otherwise to his daughters, and if all the beneficiaries predeceased the deceased the proceeds of the policy were to be paid to his executors or administrators. In lieu of a physical examination the decedent was required to take out a second or an annuity contract;

(b) The other contract, an annuity in consideration of a single premium of $12,142.92 provided for semi-annual payments of $386.51 to be made to decedent during his life and for the payment upon his death of $6,071.46 to his wife, if living, otherwise to his daughters, or if they were dead to his estate.

The decedent was 63 years old when the contracts were issued on June 29, 1933, and he died in 1939 leaving his wife and daughter surviving.

These two contracts, considered together, upon the authority of *Helvering v. Le Gierse,* 312 U. S. 531, 61 Sup. Ct. 646 were said to contain none of the true elements of insurance risk, and that section 302(g) of the Revenue Act of 1926, as amended (Sect. 811(g) of Internal Revenue Code), relating to amounts receivable "as insurance under policies taken out by decedent upon his own life" was therefore inapplicable.

> "The sole question, then," said the court, "is whether proceeds of the contracts are includible in the decedent's gross estate under section 302(c) as the subject of a transfer intended to take effect in possession or enjoyment at or after the decedent's death. That question we answer in the affirmative."

This *Goldstone* case was governed by the provisions of sect. 302(c) of the Revenue Act of 1926 as amended by the Resolution of 1931 and the Revenue Act of 1932, and has no bearing on the case at the bar of this court which is governed by the provisions of sect. 302(c) of the Revenue Act of 1926 as they read prior to the amendment of 1931. Furthermore in the *Goldstone* case the decedent in those contracts had reserved to his estate a contingent reversionary interest in the entire proceeds of both contracts, a fact which distinguishes it from the case at bar where no reversionary interest whatsoever was provided for. The following language of the court in the *Goldstone* case shows the important bearing of this reserved contingent reversionary interest upon the court's decision:

> "The decedent, in making disposition of $25,000.00 of his property through these two contracts, retained a valuable interest in that amount which was not extinguished until he died. He retained not only the right to semi-annual payments under the annuity contract but also a contingent reversionary interest in the entire proceeds of both contracts. Had he survived his wife he could have exercised the attributes of ownership over the contracts, changing the beneficiaries or surrendering the contracts as he saw fit. If he had survived both his wife and his daughters the proceeds of the two contracts would automatically have been payable to his estate when he died. *Thus the ultimate disposition of the proceeds of the contracts was suspended until the moment of decedent's death.* Only then did

> the respective interests of the wife and daughters become fixed; only then were their interests freed from the contingency of the decedent's survival."

And later the court says:

> "The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death delaying until then the determination of the ultimate possession or enjoyment of the property."

Heretofore, we have positively contended that *May v. Heiner,* in the Supreme Court, and *United States v. Brown,* in this court, are still good law and lay down the rule which determines on the *facts* of the instant case, that the decision of the Tax Court should be affirmed for the taxpayer.

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5. COMMENT UPON PETITIONER'S PETITION.

Meeting the Commissioner's brief head-on we come to page 5. The *Fidelity Co.* and *Estate of Field* cases *expressly except* from their decision a disturbing of the rule in *May v. Heiner.* (See concurring opinion Mr. Justice Douglas.) The *Goldstone* case on its facts was so wide of the question in the case at bar that *May v. Heiner* was not even mentioned. However, one may find extremely interesting the reasoning of the dissent of Mr. Justice Roberts, concurred in by Mr. Justice Douglas, in the *Goldstone* case.

The point we would emphasize here is, just how misleading is petitioner's language in page 5 of his

brief that: "These cases *clarify* and *interpret Helvering v. Hallock, * * * in such a way* as to *indicate clearly* that the transfers such *as the instant one are taxable * * **". What follows to page 9 of his brief is merely wishful thinking.

Petitioner's lack of fairness in his statements becomes increasingly apparent as he proceeds in his argument. At page 9 commissioner states: "The instant case is *quite similar* to Eldridge v. Rothensies * * *". There, however, decedent expressly *retained* the contingent power to dispose of the *corpus by will.* We find it *quite dissimilar* to the case before this court.

More patently on page 11 appellant states: "It is interesting to note that the Tax Court has *recently changed its views as regards this type of case* and held in a situation *quite similar* to the one here presented that there was a taxable transfer. Estate of Leaman v. Commissioner, 5 T.C. No. 84." (See C.C.H. Dec. 14735, decided *September 11, 1945.*) There, the facts were that the *corpus* was payable to life tenant or decedent's then (at death) *surviving children.* In this *Girvin* case the living children were named beneficiaries on the creation of the trust. How false the conclusion that the Tax Court has "recently changed its views" may be distilled not only from the *Leaman* case itself but also from the more recent case of *Estate of F. M. Singer,* T. C. Memo, C.C.H. decision 14820(m) *decided October 3, 1945.* There the facts do square with the *Girvin* case. And the Tax Court held, in an extremely well reasoned opinion, that there was no taxable transfer. Judge Mur-

dock, in fact, said (p. 22615), "The decedent had five children all of whom had passed their 21st birthdays while the decedent was still alive. * * * Thus *there was no uncertainty until the death of the decedent as to just who would take and what the share of each would be.* * * * The only case which he (commissioner) cites in support of this contention (uncertainty until death of decedent life tenant) is *Fidelity Philadelphia Trust Co. et al., Executors (Stinson Estate) v. Rothensies.* * * * However, the *decedent in that case had not surrendered all control over the property.* She retained the power to name other takers by her will in case those named in the trust instrument should not survive her (cf. *Leaman* case). There was an uncertainty in that case until the decedent died as to whether she had disposed of the property at all by the transfer in trust. The decedent in the present case had *completely disposed* of the property by the transfers and appointments. There was no uncertainty as to whether he had disposed of it by those instruments or whether he might make some further disposition of the remainder interests to other persons altogether. (Citing cases. * * *)"

And farther on Judge Murdock said: "However, the decedent's death was *not* the 'intended event' which enlarged the estate of the nominees or any of them. He had disposed of his property about as completely as could be expected and it should not be included in his gross estate under Section 811(c) * * * (citing cases.)" (Emphasis ours.)

The foregoing discussion of the *Leaman* and *Singer* cases hardly calls for further comment on our oppo-

nent's logic to say the very least. Nor would it seem appropriate to dignify petitioner's contentions as regards *United States v. Brown* and the *Central Hanover Bank* cases, p. 11 et seq. It requires no Herculean feat of the mind to conclude that we not only "may" but do rely on the *Brown* case in this Circuit.

At the bottom of page 13, appellant states: "A similar case is now pending in the Third Circuit on appeal by the commissioner from the *Tax Court's* decision in *Estate of Church* * * *. A *similar point is involved* in *Estate of Gallois* * * *, appeal to this court (C.C.A. 9) now pending * * *." Judge Denman has since (November 16, 1945) written the opinion affirming the judgment of the Tax Court for commissioner. But the *Gallois* case, *on its facts* is far from "similar" to the case now before this court. The limitation in the *Gallois* trust instrument was that *any part of the corpus might* be applied by the trustees for benefit of life tenant. Also, the trustor was a trustee, life tenant and decedent!

The *Estate of Church,* on the other hand, does come close to the *Girvin* case on its facts. There the Tax Court as here held for the taxpayer. What the Third Circuit will do with the *Church* case is not hard to guess. It is the Third Circuit which decided *Commissioner v. Kellogg,* 119 Fed. (2d) 54 in favor of taxpayer. In the *Brown* case the Ninth Circuit followed on a parity of reasoning.

The cases of *Estate of Hamon,* 136 Cal. App. 517 and *Estate of Steele,* 124 Cal. 533 cited by petitioner have no application to the issues in this case.

What the petitioner is really asking of this court is (a) that it overrule itself in the *Brown* case and thereby create a probable conflict with the Third Circuit and that (b) it refuse to follow *May v. Heiner,* when the Supreme Court, itself, still declines to say that *May v. Heiner* is no longer the law of the land, but on the contrary elaborately distinguishes from it such cases as *Helvering v. Hallock* and those cited here by the petitioner.

Upon what ground does the petitioner make such a request of this court? Upon the ground that in construing tax laws, all doubts are to be resolved in favor of the taxing government? Or upon the ground that, in applying the practicable probems of tax law to the taxpayer, substance and actualities are to be thrown in the discard, in favor of mere possibilities without interest, or other imaginary shadows, void of everything except hope, provided their use, if sanctioned, might net more revenue.

We suggest that the petitioner has presented no good reason why this court in this case should overrule *U. S. v. Brown* or disregard *May v. Heiner.* We suggest further that, under these circumstances, the decision of the Tax Court, in this case, should be affirmed.

Dated, San Francisco,
January 2, 1946.

Respectfully submitted,
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